

**Nite Beauty Industries Sdn Bhd & Anor v
Bayer (M) Sdn Bhd**

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HIGH COURT (MUAR) — PETITION NO 34-1 OF 1999

JEFFREY TAN J

25 APRIL 2000

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Civil Procedure — Parties — Intervention — Whether can be applied for after order for scheme of arrangement and compromise perfected — Rules of the High Court 1980 O 15 r 6(2) (b)

Bayer was an unsecured creditor of the first petitioner and as such was bound by the scheme of arrangement and compromise approved by order of the court on 14 May 1999 ('the order') pursuant to s 176(3) of the Companies Act 1965. Bayer applied to be added as a party to this proceeding and also to declare a nullity the order or to declare that the ambit of the order does not include the debt due and owing by the first petitioner to Bayer.

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Held, refusing the application:

- (1) Any person who is not a party to a proceeding may be added as a party if he can bring himself within the scope of O 15 r 6(2)(b) of the Rules of the High Court 1980 (see p 317G).
- (2) The would-be intervener must show that he has a legal interest and not merely a commercial one in the subject matter of the action, ie his rights or liabilities to any party to the action in respect of the subject matter of the action will be directly affected by any order which may be made in the action (see p 318F-G).
- (3) Although O 15 r 6(2) states that such an application could be made at any stage of the proceedings, its scope should be limited to an application made before final judgment had been entered and not after because the proceedings would then have come to an end. Thus the would-be intervener who will be directly affected, either legally or financially, by any order which may be made in the action, must intervene before that order is perfected and whilst the court is still not functus officio. All proceedings came to an end upon the approval of the scheme of arrangement and compromise on 14 May 1999, thus the court no longer has any jurisdiction to make any order under O 15 r 6(2) (see pp 318H-319B, E, I).
- (4) As Bayer's application to be added as a party is refused, Bayer's application to set aside the order is hereby dismissed. Moreover, the court cannot set aside the order pursuant to O 32 r 6, as the order is not an order made pursuant to an application in chambers (see p 320D).

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A [Bahasa Malaysia summary]

Bayer adalah pemiutang tak bercagar pempetisyen pertama dan dengan itu adalah tertakluk dengan skim penyusunan dan kompromi yang diluluskan oleh perintah mahkamah pada 14 Mei 1999 ('perintah tersebut') menurut s 176(3) Akta Syarikat 1965. Bayer telah memohon untuk dimasukkan sebagai suatu pihak kepada prosiding ini dan juga untuk mengisytiharkan suatu pembatalan perintah atau mengisytiharkan bahawa ruang lingkup perintah tersebut tidak termasuk hutang yang masih tertunggak dan berhutang oleh pempetisyen pertama kepada Bayer.

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Diputuskan, menolak permohonan tersebut:

(1) Sesiapa pun yang bukan suatu pihak kepada suatu prosiding boleh dimasukkan sebagai suatu pihak jika beliau boleh membawa dirinya di bawah skop A 15 k 6(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat ms 317G).

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(2) Bakal pencilah mestilah menunjukkan bahawa beliau mempunyai kepentingan dari segi undang-undang dan bukan hanya sesuatu yang komersial semata-mata di dalam subjek perkara tindakan tersebut, iaitu hak-hak atau liabiliti-liabilitinya ke atas sebarang pihak berkenaan dengan subjek perkara tindakan tersebut akan dijejaskan secara terus oleh sebarang perintah yang boleh dibuat di dalam tindakan tersebut (lihat ms 318F–G).

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(3) Walaupun A 15 k 6(2) menyatakan bahawa permohonan sedemikian boleh dibuat di sebarang peringkat prosiding-prosiding tersebut, skopnya patutlah dihadkan kepada permohonan yang dibuat sebelum penghakiman muktamad dimasukkan dan bukan selepas itu oleh kerana prosiding-prosiding pada ketika itu akan tamat. Dengan itu, bakal pencilah yang akan dijejaskan secara terus, sama ada secara undang-undang atau kewangan, dengan sebarang perintah yang boleh dibuat di dalam tindakan tersebut, mestilah mencelah sebelum perintah tersebut disempurnakan dan sementara mahkamah belum lagi functus officio. Semua prosiding-prosiding tiba di penghujungnya semasa persetujuan skim penyusunan dan kompromi pada 14 Mei 1999, dengan itu mahkamah tidak lagi mempunyai sebarang bidang kuasa untuk membuat perintah di bawah A 15 k 6(2) (lihat ms 318H–319B, E, I).

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(4) Oleh kerana permohonan Bayer untuk dimasukkan sebagai suatu pihak telah ditolak, permohonan Bayer untuk mengetepikan perintah tersebut dengan ini ditolak. Lebih-lebih lagi, mahkamah tidak boleh mengetepikan suatu perintah menurut A 32 k 6 oleh kerana perintah tersebut bukanlah perintah yang dibuat menurut suatu permohonan di dalam kamar (lihat ms 320D).]

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Notes

For cases on intervention generally, see 2(2) *Mallal's Digest* (4th Ed, 19998 Reissue) paras 3278–3295.

Cases referred to

Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd. Jarjis [1991] 2 MLJ 27 (refd)

Gula Perak Bhd v Varghese Mathai [1988] 3 MLJ 358 (refd)

Gurtner v Circuit [1968] 2 QB 587 (refd)

Hong Leong Finance Bhd v Staghorn Sdn Bhd [1995] 2 MLJ 847 (refd)

Malite Sdn Bhd v Abdul Karim bin Gendut & Ors [1981] 2 MLJ 29 (refd)

MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642 (refd)

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (refd)

Sanders Lead Co Inc v Entores Metal Brokers Ltd [1984] 1 WLR 452 (refd)

Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors [1990] 3 MLJ 254 (refd)

Takang Timber Sdn Bhd v Government of Sarawak & Anor [1998] 4 MLJ 42 (refd)

Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd [1998] 4 MLJ 275 (refd)

Tajjul Ariffin bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143 (refd)

Tan Kheng Guan v Pendaftar Hakmilik Johor [1999] MLJU 69 (refd)

United Asian Bank Bhd v Personal representative of Roshammah (decd) & Ors [1994] 3 MLJ 327 (refd)

Legislation referred to

Companies Act 1965 s 176(3)

Rules of the High Court 1980 O 15 r 6(2)(b)(i), O 32 r 6

Supreme Court Practice 1997 paras 15/6/7, 15/6/7A

Cheow Wee (KS Yap with him) (Cheow Wee & Ong) for the petitioner.
SVS Param (SVS Param & Co) for the intervener.

Cur Adv Vult

Jeffrey Tan J: This is an application (encl 10) by Bayer (M) Sdn Bhd, (*Bayer*) to be added as a party to this proceeding, and also to declare a nullity the order dated 14 May 1999 or to declare that 'the ambit of the order dated 14 May 1999 does not include the debt due and owing by the first petitioner to *Bayer* for goods sold and delivered by *Bayer* to the first petitioner'.

Apparently, *Bayer* is an unsecured creditor of the first petitioner but is bound by the scheme of arrangement and compromise approved by order of the court on 14 May 1999. According to the petition filed herein: (i) in

A Muar High Court Originating Summons 24(L)-84-1998, the petitioners (the second petitioner is a subsidiary of the first petitioner) applied and the court summoned separate meetings of the secured and unsecured creditors of the petitioners, to be held on or before 25 May 1999, for the purpose of considering and approving the scheme of arrangement and compromise and proposed between the petitioners and creditors (secured and unsecured),

B (ii) two separate meetings were convened, on 26 April 1999, in accordance with the directions of the court, (iii) the required majority at both meetings approved the scheme of arrangement and compromise, without any material changes or amendments; under Scheme B, unsecured creditors are 'to take a 50% discount and [the discounted debts are to] be paid over five

C years from 1 January 2000 ... '. Then, on 14 May 1999, Md Raus Sharif J approved the scheme of arrangement and compromise. Pursuant to s 176(3) of the Companies Act 1965, Scheme B — agreed by the required majority and approved by order of the court — shall be binding on all unsecured creditors including *Bayer*. And it would appear that this court, with regard to the order dated 14 May 1999, is functus officio.

D Mr SV Param contended however, for *Bayer*, that the order dated 14 May 1999 is a nullity. He said, amongst his grounds, here and there, for saying that the order dated 14 May 1999 is a nullity, that this petition should have been filed in Muar High Court Originating Summons No 24(L)-684-1998, that *Bayer* was not heard and that therefore justice

E was not done. But Mr Param dwelled only fleetingly on those grounds, as both counsel eventually agreed, to confine their arguments to O 15 r 6(2) of the Rules of the High Court 1980 and *Bayer's* application to be added as a party, and to argue the alleged nullity only if *Bayer* had first been added as a party to this proceeding.

F On *Bayer's* application to be added as a party, Mr Param contended that *Bayer* remains a creditor of the first petitioner but is affected, 'both legally and financially', by the scheme of arrangement and compromise. And he submitted, that O 32 r 6 permits the court, 'if O 15 r 6 is not applicable', to set aside the ex parte order dated 14 May 1999. But amazingly, Mr Param did not say nor show why *Bayer* is a 'person' under O 15 r 6(2)(b).

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Undoubtedly, under O 15 r 6, 'a person who is not a party may be added as a defendant against the wishes of the plaintiff either on the application of the defendant or on his own intervention, or in the rare cases by the court of its own motion. The jurisdiction of the court under this rule is entirely discretionary' (The Supreme Court Practice 1997 para 15/6/7).

H Nevertheless, the court may only order, not just any person, but only any of the following persons to be added as a party, namely:

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- (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
 - (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any

relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.'

(Order 15 r 6(2)(b)(i) and (ii))

In *Gula Perak Bhd v Varghese Mathai* [1988] 3 MLJ 358, where Mr Mathai sought to be added as a party to the originating petition, pursuant to O 15 r 6(2)(b)(ii), VC George J (as he then was) held that to add Mr Mathai as a party, 'it has to be established that there is a question or issue to be tried as between Mr Mathai and one of the existing parties in the petition, and that question or issue arises out of or relates to or is connected with any relief or remedy claimed in the petition'. Likewise, to add a person as a party, pursuant to O 15 r 6(2)(b)(i), it has to be established that the person ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.

The objects of O 15 r 6(2)(b) are namely: '(a) to prevent multiplicity of actions and to enable the court to determine disputes between all parties to them in one action (*Malite Sdn Bhd v Abdul Karim bin Gendut & Ors* [1981] 2 MLJ 29); (b) to prevent the same or substantially the same questions or issues being tried twice with possibly different results' (*Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143); and (c) 'to enable a court to prevent injustice being done to a person whose right will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard' (*Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52, per Lord Diplock). Those objects 'are achieved by enabling a person not a party to be added as a party' (The Supreme Court Practice 1997 para 15/6/7).

'The would-be intervener should have some interest which is directly related or connected with the subject matter of the action ...' (The Supreme Court Practice 1997 para 15/6/7A). 'Interest here means a legal interest not a commercial interest' (*Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275). 'A mere commercial interest in its outcome, divorced from the subject matter of the action, is not enough' (*Sanders Lead Co Inc v Entores Metal Brokers Ltd* [1984] 1 WLR 452). 'A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action' (*Pegang Mining*). A person who is directly affected, either legally or financially, by any order which may be made in the action, may be added (see eg *Gurtner v Circuit* [1968] 2 QB 587; see also *Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Farjis* [1991] 2 MLJ 27, where Gunn Chit Tuan SCJ (as he then was) said, at p 28, that 'the effect of *Gurtner v Circuit* is to include any case in which the intervenor is directly affected not only in his legal rights but in his pocket').

'Although O 15 r 6(2) states that such an application could be made 'at any stage of the proceedings', this does not mean that such an application can be made after final judgment had been entered' (*Tai Choi Yu*). 'Order 15 r 6 only applies to proceedings where the substitution of any of the

A parties to the cause or matter was made before final judgment' (*Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MLJ 254 per Gunn Chit Tuan J, as he then was). 'Intervention will not be allowed if the proceedings have ended' (*Tan Kheng Guan v Pendaftar Hakmilik Johor* [1999] MLJU 69). The would-be intervener who is directly affected, either legally or financially, by any order which may be made in the action, must
B intervene before that order is perfected and whilst the court is still not functus officio (*MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642; *United Asian Bank Bhd v Personal representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327). The following authorities say the same.

C Two years after the judicial sale, in *Hong Leong Finance Bhd v Staghorn Sdn Bhd* [1995] 2 MLJ 847, Staghorn filed an application for leave to intervene and for an order to set aside the sale and order for sale and for other consequential orders. The High Court granted Staghorn leave to intervene, proceeded to hear the rest of the application and granted the substantive reliefs claimed. On appeal, the Court of Appeal per
D NH Chan JCA said at p 850:

From the opening words of O 15 r 6(2), it will be seen that the order to add, join or intervene in the proceedings can be made 'at any stage of the proceedings in any cause or matter'. The question for determination, therefore, is whether there were any proceedings in existence ... when the order for intervention was made ... or when the summons seeking intervention was issued ... when the certificate of sale was issued by the registrar of the High Court, nothing further remained to be done in the proceedings. There were no proceedings in existence after that date. The court would have had no jurisdiction thereafter to make any order under O 15 r 6(2). The proceedings came to an end upon the issuance of the certificate of sale on 18 February 1992, and therefore the order for intervention which was made on 30 January 1995, or the summons for leave to intervene which was filed on 4 December 1993, had not been made or issued 'at any stage of the proceedings' as required by O 15 r 6(2).

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G In *Takang Timber Sdn Bhd v Government of Sarawak & Anor* [1998] 4 MLJ 42, the applicant applied for leave to intervene and/or to be added as a plaintiff, pursuant to O 15 r 6. Judgment had been given and the final order had been perfected and extracted. Dismissing the application, Elizabeth Chapman JC said at p 45:

H An order under this rule can only be made before judgment whereas in this case we have a situation where the plaintiff's action against both defendants in this suit has been adjudicated upon, the action has been dismissed with costs. There does not exist any question or issue arising out of or relating to or connected with any relief or remedy claimed in the suit which remains to be determined between the applicant and the defendants.

I Altogether it translates, that after 14 May 1999, when the court approved the scheme of arrangement and compromise, nothing further remained to be done in the proceedings. All proceedings came to an end upon the approval of the scheme of arrangement and compromise on 14 May 1999. All matters had been effectually and completely adjudicated upon, on

14 May 1999. The only thing left to be done, which in the event was done, was for the petitioners to perfect and extract the order dated 14 May 1999. No proceedings were in existence after that date. No proceedings are in existence today. There is no matter in dispute, presently. Naturally, without a proceeding and without a matter in dispute, there cannot be a 'person whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon', or a 'person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter'. There is nobody possibly within the terms of O 15 r 6(2) to be added. Moreover, encl 10 which was filed without any proceedings in existence is not an application made 'at any stage of the proceedings' as required by O 15 r 6(2). The court has no jurisdiction anymore to make any order under O 15 r 6(2). As Mr Cheow Wee for the petitioners remarked, rather dryly, 'this petition has ended'. Also, the court cannot set aside the order dated 14 May 1999, pursuant to O 32 r 6, as the order dated 14 May 1999 is not an order made pursuant to an application in chambers. For the reasons above, *Bayer's* application to be added as a party is refused.

Both counsel had agreed, that encl 10 should be dismissed, if *Bayer* is not granted leave to intervene in this proceeding. Accordingly, encl 10 is dismissed with costs.

Application dismissed with costs.

Reported by Wong Siok Chin

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